

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>RODNEY WIGGINS</b>	)	
Claimant	)	
	)	
V.	)	
	)	
<b>EAST SIDE FACTORY BUILT HOMES, LLC</b>	)	
Respondent	)	Docket No. 1,075,304
	)	
AND	)	
	)	
<b>ZURICH AMERICAN INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the December 2, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali Marchant. Jonathan Voegeli of Wichita, Kansas, appeared for claimant. Christopher McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 19, 2015, Preliminary Hearing and the exhibits, and the transcript of the November 11, 2015, evidentiary deposition of Santos Sepin, together with the pleadings contained in the administrative file.

**ISSUES**

The ALJ found claimant voluntarily participated in fighting with his co-worker, Santos Sepin; therefore, workers compensation benefits were denied pursuant to K.S.A. 44-501(a)(1).

Claimant appeals and argues respondent failed to prove he voluntarily engaged in fighting, and thus the ALJ's Order should be reversed. Claimant contends the fact he did not run from his aggressor is not sufficient to disallow coverage. Further, claimant argues his testimony is more credible than that of Mr. Sepin and should be given more weight.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues the ALJ provided greater weight to the testimony of Mr. Sepin, and deference must be given to the ALJ's credibility determinations. Respondent argues the ALJ's Order is "consistent

with the legislature's codification of the K.S.A. 44-501(a)(1)(E), which was meant to find all work related assaults to be non-compensable."<sup>1</sup>

The issue for the Board's review is: did claimant voluntarily participate in the altercation causing his injuries?

### **FINDINGS OF FACT**

#### **Claimant's testimony**

Claimant worked for respondent setting up mobile homes. Claimant worked on respondent's lot when not setting up mobile homes. On September 11, 2015, claimant was cutting branches and repairing a privacy fence as directed by his supervisor. Claimant testified he was doing the work himself, but his co-worker, Mr. Sepin, was supposed to help him. Two other coworkers, John Neal and Collin, were supposed to fix brakes on respondent's truck. Claimant stated he entered the shop and politely asked Mr. Sepin to assist him outside. When Mr. Sepin refused, claimant testified he said that was "pretty crappy of him" before getting a wheelbarrow and returning outside.<sup>2</sup>

Claimant testified he continued cutting branches and observed Mr. Sepin and Mr. Neal leave in Mr. Neal's truck. Claimant went into the office and told his supervisor, Dennis, that Mr. Sepin was not working and instead, was sitting and watching Mr. Neal. Dennis indicated he would handle the matter. Claimant then returned to work outside the office.

When Mr. Neal and Mr. Sepin returned to the shop after lunch, Mr. Neal dropped Mr. Sepin off at the front door where claimant was working outside. Mr. Sepin approached claimant and asked claimant to come with him. Claimant testified he followed Mr. Sepin into the office because he thought they were going to speak to Dennis about the morning's events. However, Mr. Sepin and claimant walked past Dennis without saying anything to him. Instead, Mr. Sepin clocked out on the time clock before stepping outside. Claimant testified that because no one said anything to Dennis and because Dennis did not say anything to them, he assumed that he and Mr. Sepin must be going outside to work. Claimant thought Mr. Sepin clocked out because he did not do so for lunch.

Once outside the office, Mr. Sepin turned and said he was tired of claimant running his mouth. At that point, claimant did not think they were going to fight. Mr. Sepin and claimant had no problems that made him think Mr. Sepin wanted to fight. Claimant testified Mr. Sepin again began walking and claimant followed him. Mr. Sepin again turned around

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<sup>1</sup> Respondent's Brief (filed Jan. 7, 2016) at 9.

<sup>2</sup> P.H. Trans. at 12.

and told claimant, “. . . that he was tired of me running my F’n mouth, and that we were going to go out back, and I said, well, I’m not going out there, that’s retarded.”<sup>3</sup>

Claimant testified that Mr. Sepin, without saying anything, began walking toward him. According to claimant, he put up his hands up to protect himself and stepped backwards. As he did so, he was picked up by Mr. Sepin and slammed to the ground. Claimant’s right shoulder struck the ground first. Mr. Sepin used his fists and knees to strike claimant when he was on the ground. Claimant did not strike back, got in a fetal position and yelled for help. Another employee came and broke up the fight.

Claimant testified his shoulder was injured and requested an ambulance and that the police be notified. A Kansas Standard Offense Report was completed by the officer who responded to the call. Claimant did not press charges against Mr. Sepin because he was asked not to by respondent’s owner, Scott Vanderhoofuen. According to claimant, Mr. Vanderhoofuen did not want the matter turned over to workers compensation and said he would take care of it. Claimant admitted having two battery charges in 2008 and 2009, but testified he had not fought since.

Claimant underwent treatment with Dr. Walker for his right shoulder, which was dislocated as a result of the fight. An MRI was read to reveal a fracture involving the greater tuberosity of the humerus, nondisplaced, a possible tear of the anterior band of the inferior glenohumeral ligament and a partial thickness articular surface tear of the supraspinatus tendon.<sup>4</sup> Dr. Walker recommended additional treatment, including possible surgery. Claimant was placed on work restrictions.

Claimant was suspended from working for a week following the incident. He testified he was terminated three or four days after his return because he was told he was a liability. Claimant worked a small job elsewhere for two weeks, but otherwise has been off work since leaving respondent.

### **Santos Sepin testimony**

Mr. Sepin testified he was assisting a co-worker, John Neal, with changing the brake of a company truck when claimant approached him regarding outside work. Mr. Sepin stated claimant asked what he was doing and then said he was not doing anything, only standing there.

Later, Mr. Sepin and Mr. Neal went to lunch. Mr. Sepin did not clock out. While at lunch, Mr. Sepin received a call from Dennis. Dennis indicated claimant accused Mr. Sepin

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<sup>3</sup> *Id.* at 20.

<sup>4</sup> *Id.*, Cl. Ex. 4 at 2.

of standing around and not working. Mr. Sepin stated the phone call angered him, and that is what started the fight. He finished lunch and returned to work. Mr. Sepin indicated that was the first time claimant commented that he was not doing his work.

When Mr. Sepin returned from lunch, claimant was standing in front of the office. Mr. Sepin asked claimant why he was running his mouth when Mr. Sepin was not there. Mr. Sepin testified claimant responded by asking, "What [are] you going to do about it?"<sup>5</sup> Mr. Sepin then suggested they both clock out and go out back. He wanted to fight out back so no one would see them. Mr. Sepin went into the building and clocked out. He was followed by claimant, and they exited the back door. No words were exchanged in the office.

After they exited the back office door, Mr. Sepin indicated claimant tried to goad him into fighting immediately instead of walking farther into the back lot. Mr. Sepin testified:

Q. Okay. So you are shown on this video walking out the door and walking between, like, two trucks, and you kind of are heading off camera, and I don't remember if you actually go off camera. Why were you heading out that way?

A. I asked him, Let's go to the back and fight back there. And he say, Come over here, right here, fucking pussy.

Q. Why did you want to go out back?

A. So nobody can see us, just me and him.

Q. Okay. And instead of you – he stops then and challenges you right here.

A. Yeah.

Q. And your comment was he called you a fucking pussy.

A. Yeah.

Q. So that's when you walked back.

A. Yes.

Q. All right. Your testimony was he took the first swing.

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<sup>5</sup> *Id.* at 14.

A. Yes. I see him swing, and I duck down and pick him up. He didn't hit me though.<sup>6</sup>

Mr. Sepin indicated that at no time did claimant attempt to walk away. Mr. Sepin testified that after claimant was on the ground, he punched and kneed claimant. Mr. Sepin indicated his fight with claimant was the only fight at respondent while he was employed there. He had not previously been in a fight since he was eight or nine years old when he lived in Micronesia.

Mr. Sepin testified he was suspended for a week following the incident, but he has since returned to work and continues as respondent's employee. When claimant returned to work, Mr. Sepin apologized to him. Mr. Sepin stated he viewed the video footage of the fight with his supervisor, Dennis, after his return, and Dennis found it funny that claimant was beat up because claimant "likes to run his mouth."<sup>7</sup>

### **John Neal testimony**

Mr. Neal testified he knows claimant and Mr. Sepin. To the best of Mr. Neal's knowledge, Mr. Sepin had not previously been in a fight while in the United States, but wrestled once with another individual.

Mr. Neal testified that while at lunch with Mr. Sepin, he took the telephone call from Dennis on speaker phone. He described the conversation with Dennis as follows:

A. [During the phone call] Dennis asked what we were doing. I told him we were going to lunch, then we had to stop by O'Reilly's on the way back to grab a part for the brakes, and Dennis said, okay, well, I was just wondering because we got a guy in the office with ruffled feathers, that's word for word what he said, and I asked, well, who is mad, and he said, well, just one of the employees in here has ruffled feathers about it, and I assumed it was probably [claimant], and [Mr. Sepin] overheard all that.

Q. Did that make [Mr. Sepin] angry?

A. Yeah.

Q. [Mr. Sepin] testified that he decided at that point that he was essentially going to do something about it. Did he talk to you about –

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<sup>6</sup> *Id.* at 48.

<sup>7</sup> *Id.* at 30.

A. He did say that, and I told him, just blow it off, don't worry about it, it's not worth getting in a fight over.<sup>8</sup>

Mr. Neal dropped Mr. Sepin off in front of the office after lunch. Mr. Neal did not see the fight and did not see Mr. Sepin again until after the fight was over. Mr. Sepin was walking and told Mr. Neal he had gotten into a fight.

### **Video recording of the altercation**

Once claimant and Mr. Sepin exited the back door of the office, their actions were captured by respondent's surveillance system, though no sound was recorded.<sup>9</sup> The video shows Mr. Sepin walking from the back door with claimant following several feet behind him. Neither claimant nor Mr. Sepin wore gloves or had tools. Claimant stopped walking after passing two parked vehicles, and Mr. Sepin turned around. Claimant motioned with his right arm, and Mr. Sepin rushed over to claimant. When Mr. Sepin was within a few feet of claimant, claimant crouched in a fighting stance, raised his fists, and bounced back away from Mr. Sepin. Claimant did not swing at Mr. Sepin, as alleged by him. Mr. Sepin lifted claimant and threw him to the ground before hitting and kneeing him repeatedly. Claimant remained in a fetal position on the ground until his co-workers arrived in a leisurely manner on the scene.

### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2014 Supp. 44-501(a) states, in part:

(1) Compensation for an injury shall be disallowed if such injury to the employee results from:

. . .

(E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

It is clear that under K.S.A. 2014 Supp. 44-501(a)(1)(E), claimant is not entitled to compensation if he voluntarily participated in the fight with Mr. Sepin. This case turns on the facts and credibility of the witnesses.

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<sup>8</sup> P.H. Trans. at 61.

<sup>9</sup> *Id.*, Cl. Ex. 5.

As the Court of Appeals noted in *De La Luz-Guzman-Lepe*,<sup>10</sup> appellate courts are ill-suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful"<sup>11</sup>

The Board generally gives deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. The ALJ had the opportunity to observe claimant and Mr. Neal testify, as well as review the video recording and Mr. Sepin's testimony, and concluded claimant voluntarily participated in the fight. This Board Member concurs and adopts the ALJ's reasoning.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>12</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>13</sup>

#### **ORDER**

**WHEREFORE**, it is the decision of this Board Member that the Order of Administrative Law Judge Ali Marchant dated December 2, 2015, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2016.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

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<sup>10</sup> *De La Luz-Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

<sup>11</sup> *State v. Scaife*, 286 Kan. 614, 624, 186 P. 3d. 755 (2008).

<sup>12</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

<sup>13</sup> K.S.A. 2014 Supp. 44-555c(j).

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Hon. Ali Marchant, Administrative Law Judge